Empire Holdings Ltd v Suruhanjaya Sekuriti Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–391–06 OF 2022
AHMAD KAMAL J
8 JANUARY 2024

Administrative Law — Judicial review — Application for — Judicial review against decision of Securities Commission — Application for mandamus directed to Securities Commission to conduct complete and thorough investigation into applicant's complaints against second respondent in relation to contraventions of securities laws and listing requirements — Whether Securities Commission omitted to enquire into applicant's complaints — Whether applicant adversely affected by decision of Securities Commission — Whether Securities Commission had abdicated its statutory and regulatory functions under Securities Commission Malaysia Act 1993 and Capital Markets and Services Act 2007 — Whether decision of Securities Commission tainted with errors of law, irrationality, illegality and/or unreasonableness — Capital Markets and Services Act 2007 s 354 — Rules of Court 2012 O 53 r 1(2) — Securities Commission Malaysia Act 1993 s 148 — Specific Relief Act 1950 s 44

The applicant, a foreign company, alleged in a separate suit ('Suit 295') that its lender had wrongfully sold its shares in the third respondent to the second respondent at an undervalue. The applicant lodged a complaint with the Securities Commission ('the SC') alleging that there were contraventions of securities laws and the listing requirements in respect of a notice of unconditional mandatory take-over offer by the second respondent for all the remaining ordinary shares in the third respondent not already held by the second respondent ('the applicant's complaint'). The SC found that the applicant's complaint was unsubstantiated and that there was no evidence of such contraventions. Aggrieved, the applicant filed the present judicial review application ('encl 13') pursuant to O 53 of the Rules of Court 2012 ('the ROC') for an order of mandamus directed to the SC to conduct a complete and thorough investigation into the applicant's complaint and to make such decision as it thinks fit. The grounds for the judicial review application were as followed: (a) the SC omitted to enquire into the applicant's complaint; (b) the applicant was adversely affected by the SC's omission; and (c) the SC had abdicated its statutory and regulatory functions under both the Securities Commission Malaysia Act 1993 ('Act 498') and the Capital Markets and Services Act 2007 ('Act 671').

Held, dismissing encl 13 with costs of RM10,000 to both the SC and the second respondent, respectively with allocator:

(1) Having perused the cause papers, the court found that the applicant was, in fact, challenging the investigative process of the SC. The court opined that where the investigative process was conducted pursuant to the relevant statutory powers and provision, the SC's investigative process was not amenable to judicial review, otherwise, the SC's function as the regulator to administer and regulate Act 671, the capital markets in Malaysia and the observance and compliance with the TOM Rules and Takeover Code would be unduly interfered with and the machinery of the SC would not function smoothly or efficiently. Therefore, it was the court's view that to allow judicial review of the SC's decision would interfere with the SC's powers of investigation under s 354 of Act 671. The above was fortified by s 148 of Act 498 which provided that the SC's investigation process could not be disclosed. Therefore, the SC's investigation should remain confidential and could not be challenged (see paras 14 & 20–24).

(2) The applicant failed to satisfy the grounds of challenge in a judicial review application. On the issue of illegality, the applicant did not plead such ground in its statement. In relation to irrationality, the SC conducted a thorough and comprehensive review of the applicant's complaint and the SC found, based on all information and documents, that there was no evidence to support such complaint. Therefore, there was no irrationality on the part of SC. The court further found that there was no procedural impropriety in the SC's findings. The applicant was given multiple opportunities to submit further documents and information to support its allegations. However, the SC's investigation revealed that there was no evidence to substantiate any contravention of securities laws (see paras 26–29).

(3) The applicant in this case was not adversely affected by the SC's decision based on the following reasons: (a) the applicant was not challenging the SC's decision that the applicant failed to substantiate its complaint and that there was no evidence to support the alleged contraventions; (b) the SC had conducted a thorough and comprehensive review of the applicant's complaint and the fact that the SC's decision was not in the applicant's favour did not mean that the SC's decision was reviewable and/or there was any procedural impropriety and/or bad faith on the part of the SC; and (c) the applicant's submissions clearly showed that the judicial review application was an abuse of court process as the applicant aimed to re-litigate issues that had already been submitted by the applicant and made by the applicant the subject of Suit 295. The decision of the High Court in Suit 295 was final and could not be reviewed or abrogated or revised or appealed against in this court (see para 49).

(4) Order 53 r 1(2) of the ROC provided that this order (O 53) was subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950

('Act 137'). Therefore, any application for an order of mandamus made by way of judicial review proceedings must comply with the requirement of s 44 of Act 137. Based on the case of *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b, in order to issue the order of mandamus, the applicant must show not only that he had a legal right to have the act performed but that the right must be so clear, specific and well defined as to be free from any reasonable controversy. Another important hurdle that needed to be crossed by the applicant for an order of mandamus was to show that there was a duty imposed by law on the respondent (see paras 55–57).

(5) There was no legal duty imposed by Parliament under Act 671 on the SC with regards to the exercise of its investigative powers under s 354 of Act 671, consequently, there was no legal duty prescribed by law that the SC was compelled to perform. Absent such a legal duty, an order of mandamus could not be granted against the SC as that would tantamount to the court substituting its opinion for the decision of the SC. Added to that, the court opined that an order of mandamus could only be issued if a distinct and specific demand or request to the SC had been made that the SC investigate the applicant's complaint and the SC then unequivocally and manifestly refused to comply with the demand or request. This was certainly not the situation here, as the SC had exercised its discretionary powers of investigation under Act 671, investigated the applicant's complaint and issued the SC's decision which was unfavourable to the applicant (see paras 62–64).

(6) Premised on the aforesaid reasons, the court was of the view that the decision of the SC was not tainted with any errors of law, irrationality, illegality and/or unreasonableness that warranted the intervention of the court (see para 65).

[Bahasa Malaysia summary

Pemohon, sebuah syarikat asing, mendakwa dalam saman yang berasingan ('Saman 295') bahawa pemberi pinjamannya telah menjual sahamnya dalam responden ketiga secara salah kepada responden kedua pada nilai yang rendah. Pemohon membuat aduan kepada Suruhanjaya Sekuriti ('SS') yang mendakwa terdapat pelanggaran undang-undang sekuriti dan keperluan penyenaraian berkenaan dengan notis tawaran pengambilalihan mandatori tidak bersyarat oleh responden kedua untuk semua saham biasa yang tinggal dalam responden ketiga yang belum lagi dipegang oleh responden kedua ('aduan pemohon'). SS mendapati aduan pemohon tidak berasas dan bahawa tiada keterangan berkaitan pelanggaran tersebut. Terkilan, pemohon memfailkan permohonan semakan kehakiman semasa ('lampiran 13') menurut A 53 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk perintah mandamus yang diarahkan kepada SS untuk menjalankan siasatan lengkap dan teliti terhadap aduan pemohon dan membuat keputusan yang difikirkan patut. Alasan-alasan untuk

permohonan semakan kehakiman tersebut adalah seperti berikut: (a) SS meninggalkan untuk menyiasat aduan pemohon; (b) pemohon terjejas teruk oleh peninggalan SS; dan (c) SS telah melepaskan fungsi berkanun dan kawal selianya di bawah kedua-dua Akta Suruhanjaya Sekuriti Malaysia 1993 ('Akta 498') dan Akta Pasaran Modal dan Perkhidmatan 2007 ('Akta 671').

Diputuskan, menolak lampiran 13 dengan kos sebanyak RM10,000 kepada kedua-dua SS dan responden kedua, setiap satu dengan alokator:

(1) Setelah meneliti kertas kausa, mahkamah mendapati bahawa pemohon sebenarnya mencabar proses penyiasatan SS. Mahkamah berpendapat bahawa apabila proses penyiasatan dijalankan menurut kuasa dan peruntukan berkanun yang berkaitan, proses penyiasatan SS tidak boleh disemak oleh semakan kehakiman, jika tidak, fungsi SS sebagai pengawal selia untuk mentadbir dan mengawal selia Akta 671, pasaran modal di Malaysia dan pencerapan dan pematuhan kepada 'TOM Rules' dan 'Takeover Code' akan diganggu secara berlebihan dan jentera SS tidak akan berfungsi dengan lancar atau cekap. Oleh itu, mahkamah berpendapat bahawa membenarkan semakan kehakiman terhadap keputusan SS akan mengganggu kuasa penyiasatan SS di bawah s 354 Akta 671. Perkara di atas diperkukuh oleh s 148 Akta 498 yang memperuntukkan bahawa proses siasatan SS tidak boleh didedahkan. Oleh itu, siasatan SS harus kekal sulit dan tidak boleh dicabar (lihat perenggan 14 & 20–24).

(2) Pemohon gagal memenuhi alasan-alasan cabaran dalam permohonan semakan kehakiman. Mengenai isu kepenyalahan undang-undang, pemohon tidak memplid alasan sedemikian dalam pernyataannya. Berhubung dengan ketidakrasionalan, SS menjalankan semakan secara teliti dan menyeluruh terhadap aduan pemohon dan SS mendapati, berdasarkan semua maklumat dan dokumen, tiada bukti untuk menyokong aduan tersebut. Oleh itu, tiada ketidakrasionalan di pihak SS. Mahkamah selanjutnya mendapati bahawa tiada ketidakwajaran prosedur dalam dapatan-dapatan SS. Pemohon diberi banyak peluang untuk mengemukakan dokumen dan maklumat lanjut bagi menyokong dakwaannya. Walau bagaimanapun, penyiasatan SS mendedahkan bahawa tiada keterangan untuk mengesahkan apa-apa pelanggaran undang-undang sekuriti (lihat perenggan 26–29).

(3) Pemohon dalam kes ini tidak terjejas teruk oleh keputusan SS berdasarkan sebab-sebab berikut: (a) pemohon tidak mencabar keputusan SS bahawa pemohon gagal untuk membuktikan aduannya dan bahawa tiada keterangan untuk menyokong pelanggaran yang didakwa; (b) SS telah menjalankan semakan yang teliti dan menyeluruh terhadap aduan pemohon dan fakta bahawa keputusan SS tidak memihak kepada pemohon tidak bermakna bahawa keputusan SS boleh

disemak dan/atau terdapat apa-apa ketidakwajaran prosedur dan/atau niat jahat di pihak SS; dan (c) hujahan pemohon jelas menunjukkan bahawa permohonan semakan kehakiman tersebut adalah satu penyalahgunaan proses mahkamah kerana pemohon ingin membicarakan semula isu yang telah dihujahkan oleh pemohon dan dibuat oleh pemohon sebagai perkara dalam Saman 295. Keputusan Mahkamah Tinggi dalam Saman 295 adalah muktamad dan tidak boleh dikaji semula atau dimansuhkan atau disemak atau dirayu di mahkamah ini (lihat perenggan 49).

(4) Aturan 53 k 1(2) KKM 2012 memperuntukkan bahawa aturan ini (A 53) adalah tertakluk kepada peruntukan Bab VIII Bahagian 2 Akta Relief Spesifik 1950 ('Akta 137'). Oleh itu, apa-apa permohonan untuk mendapatkan perintah mandamus yang dibuat melalui prosiding semakan kehakiman hendaklah mematuhi keperluan s 44 Akta 137. Berdasarkan kes *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b, untuk mengeluarkan perintah mandamus, pemohon mesti menunjukkan bukan sahaja dia mempunyai hak undang-undang untuk melakukan perbuatan tersebut tetapi hak tersebut mestilah begitu jelas, khusus dan ditakrifkan dengan baik supaya bebas daripada apa-apa kontroversi yang munasabah. Satu lagi halangan penting yang perlu dilalui oleh pemohon untuk mendapatkan perintah mandamus adalah untuk menunjukkan bahawa terdapat kewajipan yang dikenakan oleh undang-undang ke atas responden (lihat perenggan 55–57).

(5) Tiada kewajipan undang-undang yang dikenakan oleh Parlimen di bawah Akta 671 ke atas SS berhubung dengan pelaksanaan kuasa penyiasatannya di bawah s 354 Akta 671, oleh itu, tiada kewajipan undang-undang yang ditetapkan oleh undang-undang yang perlu dilaksanakan oleh SS. Tanpa kewajipan undang-undang sedemikian, perintah mandamus tidak boleh diberikan terhadap SS kerana itu sama dengan mahkamah menggantikan pendapatnya dengan keputusan SS. Di samping itu, mahkamah berpendapat bahawa perintah mandamus hanya boleh dikeluarkan jika tuntutan atau permintaan yang jelas dan khusus kepada SS telah dibuat supaya SS menyiasat aduan pemohon dan SS kemudiannya dengan jelas dan nyata enggan mematuhi tuntutan atau permintaan tersebut. Ini sememangnya bukan situasi di sini, kerana SS telah menggunakan kuasa budi bicaranya untuk menyiasat di bawah Akta 671, menyiasat aduan pemohon dan mengeluarkan keputusan SS yang tidak memihak kepada pemohon (lihat perenggan 62–64).

(6) Berdasarkan alasan-alasan yang dinyatakan di atas, mahkamah berpendapat bahawa keputusan SS tidak dicemari dengan apa-apa kekhilafan undang-undang, ketidakrasionalan, kepenyalahan undang-undang dan/atau ketidakmunasabahan yang memerlukan campur tangan mahkamah (lihat perenggan 65).]

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, FC (refd)

Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 4 MLJ 695; [2009] 2 MLRA 313; [2009] 5 CLJ 698, CA (refd)

Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA)) [2018] 2 MLJ 738; [2018] 1 MLRA 683; [2018] 6 CLJ 285; [2018] 1 AMR 436, CA (refd)

Empire Holdings Ltd v Ithmaar Development Company Ltd & Ors [2023] MLJU 651; [2023] MLRHU 519, HC (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b; [1972] 1 MLRH 497 (folld)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529, FC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321; [2008] 1 MLRA 705, FC (refd)

Mohd Afrizan bin Husain v Suruhanjaya Sekuriti Malaysia [2022] MLJU 2422; [2022] 1 LNS 2284, HC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa Malaysia Bhd [2010] MLJU 2230; [2010] 6 CLJ 581; [2010] 1 MLRH 290, HC (refd)

VCB Capital Sdn Bhd v Suruhanjaya Sekuriti Malaysia [2022] 10 MLJ 620; [2022] 3 CLJ 936; [2022] 3 MLRH 53; [2022] 2 AMR 264, HC (refd)

Legislation referred to

Capital Markets and Services Act 2007 s 354, 354(1)(b)(ii)
Courts of Judicature Act 1964 Schedule, para 1
Rules of Court 2012 O 53 r 1(2)
Securities Commission Malaysia Act 1993 s 148
Specific Relief Act 1950 s 44, Part 2, Chapter VIII

So Chien Hao (with Fatin Izyan bt Muhammad Fadzil, Wee Yeong Kang and Genevieve Vanniasingham) (Zailan & Co) for the applicant.

Lee Shih (with Annabel Tan Sher May and Charles Chong Tet Tong) (Lim Chee Wee Partnership) for the first respondent.

Michael Raj (with Susamma Thomas and Sathish Ramachandran) (Deol & Gill) for the second respondent.

Poh Choo Hoe (Shook Lin & Bok) for the third respondent.

Ahmad Kamal J:

INTRODUCTION

[1] The applicant filed an application for judicial review (encl 13) under O 53 of the Rules of Court 2012 ('the ROC') seeking, inter alia, the following orders:

(a) an order of mandamus to direct the Securities Commission ('SC') to enquire into the complaint by the applicant about contraventions of securities laws and the listing requirements in respect of notice of unconditional mandatory take-over offer issued by MAA Group Bhd ('MAAG') for all the remaining ordinary shares in Turiya Bhd ('Turiya') not held by MAAG;

(b) that the whole mandatory take-over offer process by the MAAG be stayed pending the full and final disposal of the application and if leave is granted be stayed pending the full and final disposal of the substantive judicial review;

(c) cost; and

(d) any further relief this honourable court deems fit, just and appropriate.

[2] In essence, the applicant filed this application for an order of mandamus directed to the SC to conduct a complete and thorough investigation into the complaints made by the applicant, regarding contraventions of securities laws and the listing requirements in respect of a notice of unconditional mandatory take-over offer by the MAAG for all remaining ordinary shares in the Turiya not already held by the MAAG and to make such decision as it thinks fit.

[3] After the hearing, I dismissed Empire's (applicant's) judicial review application (encl 13). The reasons for the decision are set down below.

BACKGROUND FACTS

[4] The background facts gathered from the cause papers and submissions of the parties are largely undisputed and can be summarised as follows:

(a) the applicant is Empire Holdings Ltd ('Empire'), a foreign entity incorporated in the Republic of Seychelles with a business address in Malaysia;

(b) the first respondent is the SC, a self funded statutory body entrusted with the responsibility to regulate and develop the Malaysian capital market;

(c) the second respondent is MAAG, an investment holding company;

(d) the third respondent is Turiya, a company principally involved in property management and investment holding;

(e) the present judicial review application stemmed from a dispute between the applicant, Empire and the second respondent MAAG, concerning a sale of shares in the third respondent, Turiya;

(f) in gist, Empire alleged, in a separate civil suit, that its lender had wrongfully sold its shares in Turiya to MAAG at an undervalue;

(g) on 22 June 2021, MAAG having acquired 57.78% equity interest in Turiya had through Mercury Securities Sdn Bhd ('Mercury Securities'), served on Turiya's Board of Directors a notice of unconditional mandatory take offer ('the notice') to acquire all the remaining ordinary shares in Turiya at a cash offer price of RM0.18 per share;

(h) on 28 January 2022, Empire issued a letter to the first respondent, the SC, and other related parties, alleging that the offer price of RM0.18 by MAAG was made in contravention with securities laws;

(i) on 4 February 2022, Turiya replied to Empire's letter of 28 January 2022 stating the following:

(i) Turiya would carry out the necessary investigation in respect of the allegations Empire had made, in so far as it was within Turiya's power to do so. Turiya also requested Empire to provide any evidence to substantiate their allegations. The letter was carbon copied to the SC; and

(ii) Turiya requested MAAG, amongst others, for their response in respect of Empire's complaints. This letter was carbon copied to the SC.

(j) on 10 February 2022, MAAG replied to Empire's letter dated 28 January 2022 and Turiya's letter dated 4 February 2022. In MAAG's letter dated 10 February 2022, MAAG denied all the complaints made by Empire;

(k) on 15 February 2022, Empire wrote to Turiya and the SC (in reply to Turiya's letter dated 4 February 2022). In Empire's letter dated 15 February 2022, Empire provided certain events and/or evidence that Empire had just discovered. The SC is one of the recipients of this letter;

(l) on 17 February 2022, MAAG wrote to Empire denying Empire's complaint in the letter dated 15 February 2022. This letter was copied to the SC;

(m) by a letter dated 21 February 2022, Turiya wrote to MAAG requesting their response in respect of Empire's complaints in Empire's letter dated 15 February 2022. This letter was copied to the SC and Empire;

(n) on 21 February 2022, Empire issued another letter to the SC and other related parties, alleging that a senior officer of MAAG had approached one Mr Rabindra a/l Harichadra ('Mr Rabindra') to acquire Mr Rabindra's interest in Turiya at RM0.40 per share;

(o) by a letter dated 22 February 2022, Mercury Securities forwarded MAAG's letter dated 17 February 2022 in response to Turiya's letter dated 21 February 2022;

(p) on 24 February 2022, Turiya wrote to the SC pertaining to Empire's complaint. Turiya sought the SC,s confirmation, among others, that the SC would enquire into Empire's complaints and to make such decision as it think fit;

(q) the SC had vide their letter dated 1 June 2022 informed Turiya in paras 3 and 4 as follows:

> 3. Based on the SC's investigation, together with the information and documents provided by EHL including its latest correspondence received on 31.5.2022, the SC has found that EHL's Complaint is unsubstantiated and there is no evidence to support the alleged contraventions of securities laws and Listing requirements in connection with the Notice.
>
> 4. We further refer to your announcement made to Bursa Malaysia Securities Berhad dated 31 May 2022 in respect of your judicial review application which included SC as one of your respondents (JR Application). Premised on the findings above, the JR Application is no longer relevant and the JR Application ought to be withdrawn.

(r) the SC replied vide their letter dated 1 June 2022 to Empire, saying that the SC found the Empire's complaint as unsubstantiated and no evidence to support the alleged contraventions of the securities laws and the Listing requirements in connection with the notice; and

(s) hence, the present judicial review application by the Empire.

THE LAW

[5] Judicial review is generally concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety.

[6] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process but also for substance.

[7] It is settled law that the High Court will not interfere with a decision of the SC unless it can be established that the decision is infected with errors of law.

[8] In the Federal Court case of *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, the liberal approach on judicial review in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 has been re-emphasised as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
>
> It is often said that judicial review is concerned not with the decision but the decision making process (see eg *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
>
> But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that *such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance*.
>
> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (a) illegality, (b) irrationality and (c) procedural impropriety. This is how he put it:
>
> > *By* '*illegality*' as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > *By* '*irrationality*', I mean what can by now be succinctly referred to as 'Wednesday unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow & Anor* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
> >
> > I have described the third head as '*procedural impropriety*' rather than

A failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its
B jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned '*proportionality*' as a possible fourth ground of review which called for development. (Emphasis added.)

C

[9] Further, the Court of Appeal in *Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA))* [2018] 2 MLJ 738; [2018] 1 MLRA 683; [2018] 6 CLJ 285; [2018] 1 AMR 436
D explained the test of reasonableness in a judicial review as follows:

[39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality,
E Henchy J of the Irish Court in *The State (at the Prosecution of John Keegan and Eoin J Lysaght) v The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are:

(a) it is fundamentally at variance with reason and common sense;

F (b) it is indefensible for hearing in the teeth of plain reason and common sense; and

(c) because the court is satisfied that the decision maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.

G [41] In *Meadows v Minister for Justice Equality and Law Reform* [2010] IESC 3 Denham J in her dicta (ratio) set out the following test:

This test includes the implied constitutional limitation of jurisdiction of all decision making which affects rights and duties. Inter alia, the decision maker should not disregard fundamental reason or common sense in reaching his or her
H decision. The constitutional limitation of jurisdiction arises, inter alia, from the duty of the courts to protect constitutional rights. When a decision maker makes a decision which affects rights then, or reviewing the reasonableness of the decision; (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on rational considerations; (b) the
I rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

[10] In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang*

v Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529, where it states:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, *judicial review will lie to impeach all errors of law made by an administrative body or tribunal and*, we would add, inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* (ibid) at p 70, ... *no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it*. (Emphasis added.)

[11] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the Empire must show that the SC had, among others:

(a) asked itself the wrong questions;

(b) considered irrelevant matters;

(c) failed to take relevant matters into consideration;

(d) failed to apply the proper principle(s) of law; and/or

(e) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

THE EMPIRE'S GROUND FOR JUDICIAL REVIEW

[12] In gist, the Empire's application herein is based on the following grounds:

(a) the SC omitted to enquire into Empire's complaints;

(b) Empire is adversely affected by the SC's omission; and

(c) the SC has abdicated its statutory and regulatory functions under both the Securities Commission Act 1993 and Capital Markets and Services Act 2007.

THE DECISION OF THE COURT

The SC omitted to enquire into Empire's complaints

[13] In the present judicial review application, Empire's primary allegation is that the SC's investigation was not comprehensive or complete and was carried out in bad faith. Empire also alleged that the SC failed to take any steps to review a transcript of conversation between Mr Rabindra and two other individuals.

[14] Having perused the cause papers, this court finds that Empire is, in fact, challenging the investigative process of the SC. Case law seems to suggest that where investigative process was conducted pursuant to the relevant statutory powers and provisions, the investigative process is not amenable to judicial review.

[15] To hold such an investigation process reviewable would open up the investigation process of all enforcement agencies to constant judicial review. Furthermore, the SC is restricted by secrecy provisions under the securities law from disclosing any information obtained during the performance of its regulatory functions.

[16] The court has shown a reluctance to interfere with the decisions of regulatory bodies unless the proceedings are in excess of statutory authority or so erroneous in law such that the authority is subject to judicial review.

[17] In the Court of Appeal case of *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695; [2009] 2 MLRA 313; [2009] 5 CLJ 698, the applicant had applied for leave for judicial review proceedings against the decision of Bursa Malaysia Securities Bhd to proceed with the inquiry proceedings against the applicant for breach of the main market listing requirements.

[18] The Court of Appeal, in deciding that leave should not be granted, recognised that it is not the function of the court to second guess the decisions of regulatory bodies, and held that the applicant had not been able to persuade the court that the enforcement proceedings were in excess of Bursa's statutory authority or so erroneous in law to render Bursa susceptible to judicial review when it said as follows:

> [39] ... The efficacy of Bursa's enforcement actions is to be sustained by its own internal procedures, commencing with a show cause notice, deliberation and decision making process by a tribunal that is intended to decide on matters, concomitant with its public interest object of promoting market integrity and invest protection ... In essence at the heart of the enforcement proceedings of Bursa, as a regulator of a capital market, timeliness and accuracy are crucial factors.
>
> [41] ... The situation warrants a reference to the judicial statement in *R v Securities and Futures Authority ex p Panton* (20 June 1994, unreported) per Sir Thomas Bingham:
>
> > It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies established under that Act should be regulatory bodies and that *it is not the function of the court in*

anything other than a clear case to second guess their decisions or, as it were to look over their shoulder. (Emphasis added.)

[19] In *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa Malaysia Bhd* [2010] MLJU 2230; [2010] 6 CLJ 581; [2010] 1 MLRH 290 Hadhariah JC (now JCA) was of the view that Bursa, having been vested with the power to ensure its rules and regulations were complied with by its members, had an unfettered discretion in the exercise of its powers which would only warrant interference by the court if such discretion was not exercised in good faith. The learned judge held that:

[27] ... *The court should be slow to interfere with the decisions of Bursa who had been vested with the power to decide freely, fearlessly and without the prospect of the correctness of its decision being investigated in protecting the public interest*. (Emphasis added.)

(See also: *VCB Capital Sdn Bhd v Suruhanjaya Sekuriti Malaysia* [2022] 10 MLJ 620; [2022] 3 CLJ 936; [2022] 3 MLRH 53; [2022] 2 AMR 264; *Mohd Afrizan bin Husain v Suruhanjaya Sekuriti Malaysia* [2022] MLJU 2422; [2022] 1 LNS 2284.)

[20] Premised on the above, I am of the view that where the investigative process was conducted pursuant to the relevant statutory powers and provision, the SC's investigative process is not amenable to judicial review.

[21] If the investigative powers of the SC were made by this honourable court as the subject of judicial review, the SC function as the regulator to administer and regulate the Capital Markets and Services Act 2007 ('the CMSA'), the capital markets in Malaysia and the observance and compliance with the TOM Rules and Takeover Code will be unduly interfered with and the machinery of the SC will not function smoothly or efficiently.

[22] Therefore, it is this court's view that to allow judicial review of the SC decision will interface with the SC's powers of investigation under s 354 of the CMSA.

[23] The above is fortified by s 148 of the Securities Commission Malaysia Act 1993 ('the SCMA') which provides that the SC's investigation process cannot be disclosed.

[24] Therefore, I am of the view that the SC's investigation should remain confidential and cannot be challenged.

Empire failed to satisfy the grounds of challenge in a judicial review application

A **[25]** Empire must establish that the SC has either acted unlawfully or irrationally or committed a procedural impropriety with regard to Empire's complaint and the SC decision to justify Empire's judicial review application.

B **[26]** However, I find that Empire failed to satisfy the grounds of challenge in a judicial review application.

[27] On the issue of illegality, I find that Empire did not plead such ground in Empire's statement.

C

[28] In the instant case, the SC conducted a thorough and comprehensive review of Empire's complaint and the SC found, based on all information and documents, that there was no evidence to support Empire's complaint. Therefore, there is no irrationality on the part of SC.

D

[29] Further, I find that there is no procedural impropriety in the SC's findings. Empire was given multiple opportunities to submit further documents and information to support its allegations. However, the SC's investigation reveals that there was no evidence to substantiate any
E contravention of securities laws.

The SC conducted a thorough and comprehensive review

F **[30]** Notwithstanding my finding above, for completeness I will address the Empire's complaint against the SC.

[31] I find that the SC has taken all necessary action to investigate Empire's complaint and has issued the SC decision. Empire's complaint is contained in
G and described in Empire first letter and Empire second letter.

[32] Empire's first letter dated 28 January 2022 (received by the SC on 15 February 2022): Empire's interest is prejudiced by the MTO offer at a cash offer price of RM0.18 per share. MAAG had allegedly acquired part of Turiya's
H shares at a price above RM0.40 as of February 2021.

[33] Empire's second letter dated 15 February 2022 (received by the SC on 21 February 2022): there was an offer to purchase Mr Rabindra's share at the
I price of RM0.40 per share.

[34] Upon receipt of Empire's complaint, evidence shows that the SC conducted, among others, the following investigations:

(a) first review: a review of trading data of the relevant parties in the past six months prior to the MTO offer up to 28 February 2021 in relation to the alleged acquisition of Turiya's shares at RM0.40 and above (see: encl 89, p 96, para 62);

(b) second review: a review of the trading data of MAAG and named PACS from 22 December 2020 to 28 February 2021 (see: encl 89, p 96, para 65);

(c) third review: a review of the trading data of MAAG and Turiya's personnel, including MAAG's directors, substantial shareholders and PACs and Turiya's directors and substantial shareholders. The period reviewed by the SC was from six months prior to the MTO offer up to 14 March 2022 (see: encl 89, p 101, paras 79 and 80);

(d) fourth review: a review of the trading data of possible parties connected to Tunku Yaacob. The SC performed a CDS search and found no CDS account for Ithmaar Development Co Ltd (which was mentioned in Kuala Lumpur High Court Civil Suit No WA-22NCC-295–07 of 2021 ('Suit 295') as having acted in concert with Tunku Yaacob) (see: encl 89, p 103 para 89).

[35] Based on the above, the SC reviewed approximately one year and four months (22 December 2020 to 14 March 2022) worth of trading data of various parties.

[36] As part of the SC's investigation, I find that the SC also requested further information and/or supporting documents as follows:

(a) on 20 May 2022, the SC enquired DWA Advisory if Turiya had any information to be shared with the SC concerning Empire's complaint (see: encl 89, p 110, para 113); and

(b) on 23 May 2022, the SC requested Empire to provide further information (if any) concerning matters stated in Empire's first letter and Empire's second letter (see: encl 89, p 110, para 114).

[37] Further, I noticed that, the SC has commenced its investigation as early as February 2022, contrary to Empire's main issue, where in their erroneous perspective, the proximity of time between 26 May 2022 (Empire provided recordings) and 1 June 2022 (the SC's decision) are close, implying that the SC had only commenced investigation upon being provided with the recordings. In this regard, any allegations that the SC failed and/or omitted to take any action upon receiving Empire's complaint are untenable and devoid of merit (see: encl 89, p 335 for Mercury Securities email to the SC).

[38] As a result of the SC's investigations, which were based on all

information and documents, including those that were provided by Empire (including the latest correspondence received on 31 May 2022), it was found that there was no evidence supporting Empire's complaint.

[39] Based on the above, it is clear that the SC has thoroughly and comprehensively reviewed Empire's complaint from when the SC received Empire's complaint up to the SC's decision letter, the SC has conducted four separate reviews of the documents and information. The SC also requested further information and documents from DWA advisory and Empire on two separate occasions.

[40] Therefore, I find that the allegation by Empire that the SC had failed to conduct a complete and comprehensive investigation is untenable and devoid of merit.

[41] It is to be noted that on 3 July 2021 , Empire then commenced an action in Suit 295 against, among others, MAAG, Turiya and Ithmaar Bank. Empire contended that the defendants breached their contract and/or duty of care as Empire's lender by selling the Turiya Shares to MAAG at below market value and/or at an undervalue.

[42] Empire also filed an injunction application against the parties in Suit 295 to, among others, restrain the proceedings of the MTO offer (first injunction application). The High Court granted an ad interim injunction to Empire on 7 July 2021.

[43] On 27 September 2021, the High Court in Suit 295 dismissed Empire's first injunction application. The High Court found, among others, that the sale was completed, and the Turiya shares have been duly registered in MAAG's name. Empire appealed against the High Court's decision dismissing its first injunction application.

[44] On 1 December 2021, the Court of Appeal dismissed Empire's appeals.

[45] I noticed that the SC's position that there was 'no evidence to requirements in connection with the notice' is supported by the learned High Court judge's post trial findings in Suit 295 *Empire Holdings Ltd v Ithmaar Development Company Ltd & Ors* [2023] MLJU 651; [2023] MLRHU 519 where the learned judge held as follows:

> [139] Thus, *there is no evidence before the court that a 'RM0.40 offer' exists at all and this allegation of 'RM0.40 offer' is merely a bare assertion* which this court must ignore (*Empire's complaint in Empire's second letter*).
>
> [143] *The average weekly price of Turiya's shares from 2015 until date of the sale on*

22 June 2021 is RM0.174 and IDC and Ithmaar Bank having held the Turiya Shares since 2008 to 2015 were well placed to evaluate the value of the Turiya Shares and ensure reasonable realisation to reduce the outstanding amounts owed by EHL. (Emphasis added.)

[46] In view of the above, this court is of the view that Empire's judicial review application is akin to a backdoor attempt to revive Empire's complaint in the hope of a favourable outcome.

[47] Further, having perused the facts presented before this court, I am of the view that there was no procedural impropriety or bad faith on the part of the SC. The averments made by Empire against the SC were bare assertions.

Whether Empire adversely affected by the decision of the SC

[48] The Empire submits that Empire is adversely affected by the SC's omission for the following reasons:

(a) the acquisition of the shares by MAAG was grossly undervalued, which MAAG acquired at RM0.18 per shares by way of an impugned sale and purchase agreement dated 22 June 2021;

(b) the seller of the impugned sale and purchase agreement is Ithmaar Bank BSC claiming itself as the legal and beneficial owner of those shares;

(c) the shares were charge to Ithmaar Development Ltd (as chargee) by Empire (as chargor). It is the contention of Empire that Ithmaar Bank BSC lacks the legal capacity to enforce a charge that it is not a party to it;

(d) the sale price of RM0.18 per unit shares was pre determined way back in 2020; and

(e) as a result of the acquisition of the shares by way of undervalued, MAAG acquired the controlling block in Turiya. Hence, it is mandatory for MAAG to issue the mandatory take over offer to all minority shareholders, in which Empire is one of the minority shareholders.

[49] On this issue, I agree with the submissions of the SC and MAAG that Empire is not adversely affected by the SC's decision based on the following reasons:

(a) Empire is not challenging the SC's decision that Empire failed to substantiate its complaint and that there was no evidence to support the alleged contraventions;

(b) as I have mentioned above, the SC conducted a thorough and comprehensive review of Empire's complaint. The fact that the SC's

decision is not in Empire's favour does not mean that the SC's decision is reviewable and/or there is any procedural impropriety and/or bad faith on the part of the SC;

(c) the SC's findings in respect of Empire's complaint are supported by the learned High Court judge's decision in Suit 295 after a full trial as mentioned in para 45 above;

(d) Empire's submission on the 'No Right to Sell' and as to 'the Sale at Undervalue' allegations had been determined by the High Court in Suit 295 with the High Court dismissing the 'No Right to Sell' and 'Sale at Undervalue' allegation of the Empire;

(e) having elected to go to the High Court under Suit 295 for the determination of the 'Sale at Undervalue' and the 'No Right to Sell', the applicant cannot now in Empire's submissions raise the same allegations or complaints to this judicial review application; and

(f) Empire's submissions clearly demonstrates that Empire's judicial review application is an abuse of court process as Empire aims to relitigate issues that had already been submitted by Empire and made by Empire the subject of Suit 295. The 'Sale at Undervalue' and 'No Right to Sell' have been determined by the High Court in Suit 295. The decision of the High Court in Suit 295 is final and cannot be reviewed or abrogated or revised or appealed against in this honourable court.

Mandamus

[50] Empire in its judicial review application is seeking for the mandamus order to compel the SC to investigate Empire's complaint.

[51] The Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321; [2008] 1 MLRA 705, held that an order of mandamus can be granted either:

(a) under s 44 of the Specific Relief Act 1950 ('the SRA'); or

(b) the additional powers of the High Court provided by para 1 of the Schedule to the Courts of Judicature Act 1964 ('the CJA').

[52] It is also to be noted that O 53 r 1(2) of the ROC provides that this order (O 53) is subject to the provisions of Chapter VIII of Part 2 of the SRA.

[53] Therefore, any application for an order of mandamus made by way of judicial review proceedings must comply with the requirement of s 44 of the SRA.

[54] Section 44 of the SRA reads as follows:

ENFORCEMENT OF PUBLIC DUTIES

44 Power to order public servants and others to do certain specific acts

(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that —

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorise a Judge —

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[55] In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b; [1972] 1 MLRH 497, Sharma J (as he then was) had outlined four prerequisites essential to the issue of an order under s 44 of the SRA or of a mandamus:

(a) whether the applicant has a clear and specific legal right to the relief sought;

(b) whether there is a duty imposed by law on the respondent;

(c) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and

(d) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

[56] Based on the case, in order to issue the order of mandamus, the applicant must show not only that he has a legal right to have the act performed but that the right must be so clear, specific and well defined as to be free from

any reasonable controversy. The order cannot be issued when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent will deny the order of mandamus.

[57] Another important hurdle that needs to be crossed by the applicant for an order of mandamus is to show that there is a duty imposed by law on the respondent.

[58] Coming back to the facts in the present case. Empire is seeking an order of mandamus to compel the SC being a regulatory body, acting independently, to conduct a thorough investigation on a complaint where a finding has already been made and which outcome ie the SC decision which is not in favour of the applicant was conveyed to the applicant on 1 June 2022. This clearly tantamounts to an abuse of the process of court and aimed only to delay, impede, frustrate and obstruct the MTO by the MAAG.

[59] Section 354(1)(b)(ii) of the CMSA gives the SC the powers to investigate any breach of the securities laws of Malaysia including any breach of the TOM Rules and the Takeover Code.

[60] The functions of the SC under s 354(1)(b)(ii) of the CMSA are investigative and where the function is investigative, the exercise of that function is not reviewable by the court.

[61] The provisions of s 354 of the CMSA do not impose a legal duty on the SC that the SC must investigate every complaint made to it.

[62] Since there being no legal duty imposed by Parliament under the CMSA on the SC with regards to the exercise of its investigative powers under s 354 of the CMSA, there is consequently no legal duty prescribed by law that the SC is compelled to perform.

[63] Absent such a legal duty, an order of mandamus cannot be granted against the SC as that would tantamount to the court substituting its opinion for the decision of the SC.

[64] Added to that, this court is of the view that an order of mandamus can only be issued if a distinct and specific demand or request to the SC had been made that the SC investigate Empire's complaint and the SC then unequivocally and manifestly refuses to comply with the demand or request. This is certainly not the situation here, as the SC had exercised its discretionary

powers of investigation under the CMSA, investigated Empire's complaint and issued the SC decision which is unfavourable to Empire.

CONCLUSION

[65] Premised on the aforesaid reasons, I am of the view that the decision of the SC is not tainted with any errors of law, irrationality, illegality and/or unreasonableness that warrant the intervention of this court.

[66] As such, Empire's application for judicial review (encl 13) is dismissed with costs of RM10,000 to both the SC and MAAG, respectively with allocator.

Enclosure 13 dismissed with costs of RM10,000 to both SC and second respondent, respectively with allocator.

Reported by Dzulqarnain Ab Fatar